

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002



Date: February 1, 1999

Case No.: 1996-INA-0200

In the Matter of:

CLAUDIA CATANIA CADY
Employer

On Behalf Of:

MALGORZATA CHECINSKA
Alien

Certifying Officer: Dolores DeHaan, Region II

Appearance:
For the Employer/Alien

Before: Huddleston, Jarvis and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,¹ and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 25, 1994, Claudia Catania Cady ("Employer") filed an application for labor certification to enable Malgorzata Checinska ("Alien") to fill the position of Cook Kosher (AF 8-9). The job duties for the position are:

Prepare, season, and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred. Plan menu. Serve meals. Prepare natural foods including organic vegetables, fruits, and juices.

(AF 9).

The requirements for the position are:

Education - eight years of Grade School; and,
Experience - two years in job offered. (AF 9).

The application specified working hours from 8:00 a.m. to 5:00 p.m, totaling 40 hours per week. (AF 9).

Employer submitted to the state agency a recruitment report dated April 12, 1995 detailing its reasons for rejecting all six U.S. workers who applied for the job. (AF 56-57). Regarding applicant Ted Krynski, Employer's report reads as follows:

We [sic] called the applicant by phone on 3/10/95, 3/11/95, 3/13/95, 3/13/95 [sic] but I could not reach the applicant. On 3/13/95 I mailed a letter via regular mail containing information about the job interview. The applicant did not respond in any manner and did not come for the scheduled interview. On 3/20/95 I mailed a certified letter to the applicant with information about job interview. Applicant Krynski did not contact us and did not come for the scheduled job interview.

(AF 56).

In a letter received by the state agency on March 27, 1995, Mr. Krynski denied being contacted in any way by Employer. (AF 39).

¹ All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued a notice of Findings on September 29, 1995 (AF 66-68), proposing to deny certification on two grounds: Employer rejected U.S. worker applicants, including Mr. Krysinski, without providing lawful, job-related reasons, thereby violated 20 C.F.R. § 656.21(b)(6); and, Employer failed to recruit in good faith, thereby violated 20 C.F.R. § 656.20(c)(8). The CO took note of Employer's contention that "Ted Krysinski was rejected on the basis that [Employer] called [Krysinski] several time [sic] and sent a certified letter but received no response." (AF 67). The CO further noted that Employer failed to submit a copy of the return receipt for the certified letter sent to Krysinski. (AF 67). The CO incorrectly stated that Employer failed to submit a copy of that letter, as Employer did include a copy of the letter (AF 50). The CO directed Employer to "further document the lawful, job-related reasons for rejection of the above applicant and that employer's actions or lack thereof (as applicable) did not constitute dismissing [Mr. Krysinski] from consideration without valid basis, establishing good faith efforts were directed to this worker not established to be unqualified." (AF 66).

Accordingly, the Employer was notified that it had until November 3, 1995, to rebut the findings or to cure the defects noted. (AF 68).

In its rebuttal, dated October 6, 1995 and sent under a cover received October 27, 1995 (AF 69-74), Employer repeated its account of its attempts to contact Mr. Krysinski. Specifically, Employer wrote of three phone calls, one regular mail letter and one certified letter sent to Mr. Krysinski. (AF 70). Employer again claimed that Mr. Krysinski failed to return any of its contacts and was, therefore, rejected for lawful, job-related reasons. (AF 70).

The CO issued the Final Determination on November 3, 1995 (AF 75-76), denying certification on the ground that Employer failed to provide a lawful, job-related reason for rejecting a U.S. worker, thereby violating 20 C.F.R. § 656.21(b)(6). The CO noted that Employer failed to submit evidence, specifically the return receipt from the certified letter, which would have demonstrated that Mr. Krysinski actually received the letter. (AF 75). Because Employer failed to adequately document that Mr. Krysinski was rejected solely for lawful, job-related reasons, the application for alien labor certification was denied. (AF 75).

On November 24, 1995, the Employer requested review of the Denial of Labor Certification (AF 78-88). The CO denied reconsideration on February 26, 1996, and on February 28, 1996, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Implicit in the Notice of Findings is the CO's concern that Mr. Krysinski never received Employer's phone calls or letters. For reasons which are not clear, the Notice of Findings never explicitly mentions the lack of proof regarding this matter. However, Employer's evidence includes photocopies of the Receipt for Certified Mail for the certified letters sent to U.S. applicants Gabon, Krysinski, and Claiborne. (AF 54, 51, 48). Examination of the receipts for the letters sent to Mr. Gabon and Ms. Claiborne shows total postage and fees of \$1.32, broken down as \$0.32 for postage and \$1.00 for the Certified Fee. It is clear from these receipts that these letters were not sent with a Return Receipt requested, as the lines pertaining to return receipts are blank and the dollar amounts would not sum properly had the appropriate fee of a return receipt been included. The receipt for the letter sent to Mr. Krysinski shows a similar total postage and fees of \$1.32, without any breakdown. It is clear from examining these three receipts that a return receipt was not requested on the certified letter to Mr. Krysinski. Thus, the vagueness on the part of the CO constitutes harmless error due to the fact that the only evidence in the record which might proved Mr. Krysinski received that letter is incapable of doing so.

The employer bears the burden of proof to show that the alien is entitled to labor certification. 8 U.S.C. 1361; 20 C.F.R. § 656.2(b). "If U.S. workers have applied for the job opportunity, the employer shall document that they were rejected solely for lawful, job-related reasons." 20 C.F.R. § 656.21(b)(6). In both its recruitment report to the state agency and its rebuttal, Employer describes phone calls and letters directed to Mr. Krysinski. Along with its recruitment report Employer also submitted a copy of the certified letter sent to Mr. Krysinski and a copy of the Receipt for Certified Mail for that letter. Thus, Employer has amply documented its attempts to contact Mr. Krysinski. Employer has failed, however, to document that Mr. Krysinski actually received any of those communications. Mr. Krysinski, in contrast, affirmatively denied being contacted by Employer.

In view of Employer's failure to submit any evidence showing that Mr. Krysinski actually received its calls or letters, we find that Employer has failed to carry its burden of proof regarding the rejection of all qualified U.S. applicants and affirm the denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: (1) when full Board consideration is necessary to secure or maintain uniformity of its decision; and, (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002*

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

